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REMARKS

PLEASE include the attached pleading into MM Dkt. 87-268. I have provided two copies.

"Working Drafts of Simulcast Issues-ISWP1" Thank you

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OFFICE OF THE ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

DRAFT

IS/WP1--0074
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FILE

Two-level Outline of Simulcasting Issues

I. Legal Issues

- A. Ashbacker doctrine requires comparative consideration of all bona fide mutually exclusive applicants for a broadcast license.
1. Ashbacker is not an impediment to the ATV licensing process.
 2. The Ashbacker rationale is tenuous in upholding the ATV licensing scheme.
- B. Mandated simulcasting has serious First Amendment implications.
1. A simulcast requirement would be a content-based regulation that would inhibit program decisions and can only be justified if it is the least restrictive means necessary to achieve the overriding public interest goals underlying the requirement.
 2. A simulcast requirement would not be a content-based regulation.

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II. Practical/Policy Issues.

- A. FCC's goal is to introduce ATV without disenfranchising NTSC viewers.
1. Simulcasting is not necessary to achieve this goal
 2. Simulcasting is necessary to achieve this goal
- B. FCC policies must encourage investment in ATV.
1. ATV receiver purchases will be stimulated by ATV-specific programming.
 2. A flexible definition of "same program" under the simulcasting rubric will best serve the FCC's goals
 3. Simulcasting should be defined to permit differentiated programming.
 4. Simulcasting should be defined as the same underlying programming at the same time.
- C. Timing on Implementing Simulcasting.
1. It is too soon to adopt rules on simulcasting.
 2. Rules on simulcasting must be in place from the outset.

Molly's Additions

DRAFT

7/20/92

SIMULCAST PAPER

I. Legal Issues

A. Ashbacker doctrine requires comparative consideration of all bona fide mutually exclusive applicants for a broadcast license.

1. Ashbacker is not an impediment to the ATV licensing process.

a) Ashbacker does not preclude the FCC from setting licensee eligibility standards: FCC has said that initially only full power licensees, authorized permittees and parties with applications for construction permits as of a date certain will qualify on the grounds that this is the most practical, expeditious and non-disruptive way to bring about ATV.

i) Existing licensees are experienced, have considerable investment in the present system, have and will continue to invest in and take substantial business risks toward developing ATV.

ii) Eligibility restrictions are temporary--first two-years only.

iii) A comparative process would impede the introduction of ATV.

b) ATV represents a major advance in technology, not the start of a new and separate video service.

c) The eligibility restriction is spectrally efficient; once the transition to ATV has been accomplished, the FCC will reclaim one of the two 6 MHz channels without abruptly disenfranchising licensees or NTSC viewers.

2. The Ashbacker rationale is tenuous in upholding the ATV licensing scheme.

a) A strict simulcast requirement is integral to the Commission's public interest rationale for awarding the second channel initially to existing broadcasters only: to bring about a transition from NTSC to ATV that will not disenfranchise NTSC viewers. Permitting broadcasters to utilize the second channel as a new programming service, even in the initial stages of operation, renders it more difficult to justify closing out other applicants (especially others with broadcast experience) and undercuts the theory that ATV is a new technology and not a new program service.

b) The eligibility rationale is seriously flawed: there is no basis for granting a preference to parities that are not currently in full operation while disqualifying broadcast licensees of other services that are fully operational.

c) The eligibility rationale cannot be sustained on grounds that it protects individual licensees, rather than seeking to protect broadcasting as a service to the public generally.

B. Mandated simulcasting has serious First Amendment implications.

1. A simulcast requirement would be a content-based regulation that would inhibit program decisions and can only be justified if it is the least restrictive means necessary to achieve the overriding public interest goals underlying the requirement.

a) To withstand judicial scrutiny, even a regulation that amounts merely to an incidental infringement of speech must be able to survive the O'Brien test:

- i) the existence and substantiality of the government interest at issue;
- ii) adoption of the least restrictive means essential to furtherance of that interest.

b) Less restrictive alternatives that would protect the public interest goal of protecting service to NTSC viewers are available; namely, the likely availability of low cost, readily available down-converters which would permit NTSC-viewer access to ATV programming.

c) It has not been demonstrated that, absent a simulcasting requirement, the harm feared, disenfranchisement of NTSC viewers, would be likely to occur--i.e., it is just as likely that broadcasters would generally simulcast NTSC and ATV programming.

d) Mandated simulcasting will have a chilling effect on the development of creative ATV programming and deprive early ATV receiver purchasers of potential program choices.

2) A simulcast requirement would not be a content-based regulation.

a) The requirement would leave each licensee free to provide whatever content he/she deems appropriate, provided both channels provide essentially the same programming.

b) Requiring simulcasting is consistent with the Commission's conditional grant of the spectrum to facilitate the transition and the determination that ATV is a new technology and not a new and separate video service.

c) Simulcasting will permit realization of the FCC's spectrum efficiency goal and avoid involving the FCC in the prohibited content decisions when it comes time to reclaim one of the two 6 MHz channels.

d) The availability of low-cost down-converters is not an adequate substitute for simulcasting unless the FCC mandates that broadcasters supply a down-converter for every television receiver and the costs are borne by broadcasters.

i) Requiring consumers to purchase even low-cost down-converters would disenfranchise NTSC viewers who choose not to purchase (or cannot afford to purchase) the new equipment.

ii) Purchases of down-converters would mean further consumer investments in the very technology (NTSC) the FCC is seeking to phase out in favor of ATV.

II. Practical/Policy Issues.

A. One of the FCC's goals is to introduce ATV without disenfranchising NTSC viewers during the transition to an all-ATV world.

1. A simulcasting requirement is not necessary to achieve this goal.

a) If NTSC-only viewers are equipped with down-converters, a requirement that ATV enhancements also be available to them through simulcasting would be less necessary.

b) At least in initial phases of ATV implementation when ATV receiver penetration is low, broadcasters most likely will continue to provide quality NTSC programming whether or not required to do so.

c) Program producers are not likely to produce product in two formats--up-conversion and down-conversion will be the most economical way for broadcasters to deliver programs in both modes, whether or not there is a simulcasting requirement.

d) The Commission's declaration of a firm conversion deadline has put broadcasters and the public on notice that NTSC will cease as of a date certain.

2. A simulcasting requirement is necessary to achieve this goal.

a) Non-simulcast programming will mean that NTSC viewers will not have access to ATV programming even in a non-ATV format.

i) Where the programming is different and inaccessible to NTSC viewers, it cannot be said that the ATV service is not a new and separate video service, thereby undercutting the policy basis for the FCC's announced licensing policy.

ii) Where the programming is different and inaccessible to NTSC viewers it cannot be said that such viewers are not being disenfranchised, even if the NTSC equipment has not been rendered technically obsolete.

b) Absent simulcast requirements, broadcasters may begin to devote their best program efforts (or, at least, significant portions of their limited resources) to ATV development, at the expense of NTSC programming.

c) Non-simulcast programming will make effectuation of the FCC's channel reversion policy more difficult, especially as viewers become accustomed to receiving both NTSC and ATV as separate program services.

B. FCC policies must encourage investment in ATV.

1. ATV receiver purchases will be stimulated by ATV-specific programming.

a) Penetration will be driven by program enhancements such as improved audio and video quality, pre-released ATV programs, multiple-plays of ATV special productions (either on a pay or free bases), and perhaps some ATV-only programming.

b) Broadcasters will have to make significant investments in ATV without promise of additional revenues, allowing flexibility to experiment could enable them to derive interim revenues that will facilitate their being able to continue to provide quality NTSC service while developing ATV services.

2. A flexible definition of "same program" under the simulcasting rubric will best serve the FCC's goals.

a) Simulcasting must be defined to permit differences inherent in the two transmission formats; namely, changes in aspect ratios, camera angles, numbers of cameras used, adoption of pan and scan editing techniques and other elements of what is otherwise identical programming.

b) Exempting commercials (and permitting substitution of different commercials) may encourage broadcaster investment in ATV.

c) A simulcasting requirement should not preclude use of excess data capacity not required for ATV transmission for ancillary purposes, including revenue-generating purposes, on a non-interfering basis (similar to use of the SAP, SCA and VBI on NTSC transmissions).

3. Simulcasting should be defined to permit differentiated programming.

a) To the extent there is not a 100% simulcast requirement, multiple-plays at different times of ATV productions, as well as pre-release, could stimulate audience demand.

b) Time shifting within a day or other, longer period, may provide an attractive vehicle and spur ATV receiver penetration.

c) Exempting programs of under a specified length from any simulcast requirement might make implementation of ATV easier for broadcasters.

d) Pay-per-view of exclusive made-for ATV programming may stimulate ATV receiver penetration and assist broadcasters in deriving an additional revenue stream from ATV transmissions.

4. Simulcasting should be defined as a the same underlying programming at the same time.

a) By definition the term simulcasting means to broadcast programs over two channels simultaneously. This definition allows for variances in production techniques for each format (i.e., different camera angles, aspect ratios, etc.) and substitution of commercials or promotions, provided primary program material is available to both ATV and NTSC viewers.

b) Efforts to define simulcasting to accommodate broadcaster interests in experimenting with new programming formats and differentiated programming would likely embroil the FCC in content-related regulations that are in fact unwarranted and unconstitutional.

c) Permitting differentiated programming runs counter to the FCC's determination that the ATV license is not a license to provide a new video program service and seriously undercuts the rationale for license eligibility.

C. Timing on Implementing Simulcasting.

1. It is too soon to adopt rules on simulcasting.

a) Initially, when ATV receiver penetration is low, NTSC programming is not likely to suffer; even as penetration increases, broadcasters will likely rely on up-converted NTSC programming to meet public interest obligations.

b) Too little is known about how ATV will develop to adopt rules that could impede acceptance of ATV; waiting until the FCC can amass data on receiver availability and penetration and the amount and type of ATV-produced programming will enable more realistic assessments on the need for rules.

c) It will be expensive for program producers and broadcasters to convert their studio facilities to ATV production mode--some flexibility from a strict simulcasting requirement will make this more likely to happen sooner.

2. Rules on simulcasting must be in place from the outset.

a) Withholding application of the simulcast requirement until four years after the introduction of the ATV service (or during a phase-in period) will promote the development of ATV as a new programming service, rather than as a new technology.

b) Broadcasters need to know from the outset exactly what the FCC is expecting of them; consumers need to know what programming will be available during the transition to ATV; and other media that retransmit broadcast programming need to know what programming will be available in each format.

c) The costs associated with down-converting HDTV programming to NTSC is minimal, especially for material produced on film, during the early years most material will likely be produced in both formats in order to serve a broader consumer market.

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Outline of Simulcasting Issues

I. Legal Issues

A. Ashbacker doctrine requires comparative consideration of all bona fide mutually exclusive applicants for a broadcast license.

1. Ashbacker is not an impediment to the ATV licensing process.

a. Ashbacker does not preclude the FCC from setting licensee eligibility standards: FCC has said that initially only full power licensees, authorized permittees and parties with applications for construction permits as of a date certain will qualify on the grounds that this is the most practical, expeditious and non-disruptive way to bring about ATV.

(1) Existing licensees are experienced, have considerable investment in the present system, have and will continue to invest in and take substantial business risks towards developing ATV.

(2) Eligibility restrictions are temporary.

(3) A comparative process would impede the introduction of ATV.

b. ATV represents a major advance in technology, not the start of a new and separate video service.

c. The eligibility restriction is spectrally efficient; once the transition to ATV has been accomplished, the FCC will reclaim one of the two 6 MHz channels without abruptly disenfranchising licensees or NTSC viewers.

2. The Ashbacker rationale is tenuous in upholding the ATV licensing scheme.

a. A strict simulcast requirement is integral to the Commission's public interest rationale for awarding the second channel initially to existing broadcasters only: to bring about a transition from NTSC to ATV that will not disenfranchise NTSC viewers. Permitting broadcasters to utilize the second channel as a new programming service, even in the initial stages of operation, renders it more difficult to justify closing out other applicants (especially others with broadcast experience) and undercuts the theory that ATV is a new technology and not a new program service.

b. The eligibility rationale is seriously flawed: there is no basis for granting a preference to parties that are not currently in full operation while disqualifying broadcast licensees of other services that are fully operational.

c. The eligibility rationale cannot be sustained on grounds that it protects individual licensees, rather than seeking to protect broadcasting as a service to the public generally.

B. Mandated simulcasting has serious First Amendment implications.

1. A simulcast requirement would be a content-based regulation that would inhibit program decisions and can only be justified if it is the least restrictive means necessary to achieve the overriding public interest goals underlying the requirement.
 - a. To withstand judicial scrutiny, even a regulation that amounts merely to an incidental infringement of speech must be able to survive the O'Brien test:
 - (1) the existence and substantiality of the government interest at issue;
 - (2) adoption of the least restrictive means essential to furtherance of that interest.
 - b. Less restrictive alternatives that would protect the public interest goal of protecting service to NTSC viewers are available; namely, the likely availability of low cost, readily available down-converters which would permit NTSC-viewer access to ATV programming.
2. A simulcast requirement would not be a content-based regulation.
 - a. The requirement would leave each licensee free to provide whatever content he/she deems appropriate, provided both channels provide essentially the same programming.
 - b. Requiring simulcasting is consistent with the Commission's conditional grant of the spectrum to facilitate the transition and the determination that ATV is a new technology and not a new and separate video service.
 - c. Simulcasting will permit realization of the FCC's spectrum efficiency goal and avoid involving the FCC in prohibited content decisions when it comes time to reclaim one of the two 6 MHz channels.
 - d. The availability of low-cost down-converters is not an adequate substitute for simulcasting unless the FCC mandates that broadcasters supply a down-converter for every television receiver and the costs are borne by broadcasters.
 - (1) Requiring consumers to purchase even low-cost down-converters would disenfranchise NTSC viewers who choose not to purchase (or cannot afford to purchase) the new equipment.
 - (2) Purchases of down-converters would mean further consumer investments in the very technology (NTSC) the FCC is seeking to phase out in favor of ATV.

II. Practical/Policy Issues.

A. FCC's goal is to introduce ATV without disenfranchising NTSC viewers.

1. Simulcasting is not necessary to achieve this goal
 - a. If NTSC-only viewers are equipped with down-converters, a requirement that ATV enhancements also be available to them through simulcasting would be less necessary.
 - b. At least in initial phases of ATV implementation when ATV receiver penetration is low, broadcasters most likely will continue to provide quality NTSC programming whether or not required to do so.
2. Simulcasting is necessary to achieve this goal
 - a. Non-simulcast programming will mean that NTSC viewers will not have access to ATV programming even in a non-ATV format
 - (1) Where the programming is different and inaccessible to NTSC viewers, it cannot be said that the ATV service is not a new and separate video service, thereby undercutting the policy basis for the FCC's announced licensing policy.
 - (2) Where the programming is different and inaccessible to NTSC viewers it cannot be said that such viewers are not being disenfranchised, even if the NTSC equipment has not been rendered technically obsolete.
 - b. Absent simulcast requirements, broadcasters may begin to devote their best program efforts (or, at least, significant portions of their limited resources) to ATV development, at the expense of NTSC programming
 - c. Non-simulcast programming will make effectuation of the FCC's channel reversion policy more difficult, especially as viewers become accustomed to receiving both NTSC and ATV as separate program services.

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1. ATV receiver purchases will be stimulated by ATV-specific programming.
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 - c. Exempting programs of under a specified length from any simulcast requirement might make implementation of ATV easier for broadcasters.
 - d. Pay-per-view of exclusive made-for ATV programming may stimulate ATV receiver penetration and assist broadcasters in deriving an additional revenue stream from ATV transmissions.
4. Simulcasting should be defined as the same underlying programming at the same time.
 - a. By definition the term simulcast means to broadcast programs over two channels simultaneously. This definition allows for variances in production techniques for each format (i.e., different camera angles, aspect ratios, etc.) and substitution of commercials or promotions, provided primary program material is available to both ATV and NTSC viewers.
 - b. Efforts to define simulcasting to accommodate broadcaster interests in experimenting with new programming formats and differentiated programming would likely embroil the FCC in content-related regulations that are in fact unwarranted and unconstitutional.
 - c. Permitting differentiated programming runs counter to the FCC's determination that the ATV license is not a license to provide a new video program service and seriously undercuts the rationale for license eligibility.

C. Timing on Implementing Simulcasting.

1. It is too soon to adopt rules on simulcasting.
 - a. Initially, when ATV receiver penetration is low, NTSC programming is not likely to suffer; even as penetration increases, broadcasters will likely rely on upconverted NTSC programming to meet public interest obligations
 - b. Too little is known about how ATV will develop to adopt rules that could impede acceptance of ATV; waiting until the FCC can amass data on receiver availability and penetration and the amount and type of ATV-produced programming will enable more realistic assessments on the need for rules.
2. Rules on simulcasting must be in place from the outset.
 - a. Withholding application of the simulcast requirement until four years after the introduction of the ATV service (or during a phase-in period) will promote the development of ATV as a new programming service, rather than as a new technology.
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 - c. The costs associated with down-converting HDTV programming to NTSC is minimal, especially for material produced on film; during the early years most material will likely be produced in both formats in order to serve a broader consumer market.